BEFORE THE INDIAN CLAIMS COMMISSION

BARON LONG, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Docket No. 80-A
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: September 19, 1973

Appearances:

Ferris, Weatherford, Brennan & Lerg, and Arthur J. Gajarsa, Attorneys for the Plaintiff, San Pasqual Band of Mission Indians.

Charles E. Burch, Jr., and Franz R. Sachse, Attorneys for Plaintiffs, Pala and Pauma Bands of Mission Indians.

Tuttle & Taylor, Incorporated, Attorneys for Plaintiffs, La Jolla and Rincon Bands of Mission Indians.

Milton E. Bander, with whom was Assistant Attorney General Clyde O. Martz. Wilma C. Martin and Bernard M. Newburg were on the Brief.

OPINION OF THE COMMISSION ON DENYING DEFENDANT'S MOTION FOR REHEARING

Blue, Commissioner, delivered the opinion of the Commission.

The Motion and Responses

The Commission has before it a motion filed on July 10, 1973, by the defendant, requesting a rehearing. The defendant charges that the Commission committed errors of fact and law in its opinions of June 13, 1973, 30 Ind. Cl. Comm. 419, and June 21, 1973, 30 Ind. Cl. Comm. 451.

The La Jolla and Rincon plaintiffs responded on August 2, 1973, opposing the motion on the ground that it is based upon a total misreading of the Commission's opinion of June 13, 1973. The San Pasqual plaintiff responded on August 7, 1973, opposing the motion on the ground that in respect to the opinion of June 21, 1973, the motion fails to state any valid grounds under the Commission's Rules, upon which it may be granted.

For the reasons stated herein, the subject motion is denied by the accompanying order.

The Defendant's Allegations Suggests a
Misreading of the Commission's Decisions and of the Law

The defendant charges that in our opinions of June 13 and 21, 1973, the Commission erred:

1. In relying solely on untested information outside of the case record for its "conclusions of fact and law"; and

2. In failing to file findings of fact supported by substantial evidence.

We agree with the plaintiffs that the defendant's allegations stem from a misreading of our decisions. They also involve a misreading of the law.

First of all, the defendant is mistaken in stating[1/] that in preparing our opinions of June 13 and 21, 1973, we did not review

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1/ P. 2, Def's. brief in support of motion for rehearing.

evidence in the record, and that those opinions were based solely on evidence proffered by the plaintiffs but not yet in the record.

Secondly, the defendant errs in contending that the opinions of June 13 and 21, 1973, were "final determinations" or established the liability of the defendant within the meaning of 25 U.S.C. § 70s(b), so as to require findings of fact supported by substantial evidence.

The questioned opinions deal with motions of the respective plaintiffs to reopen the record and to amend the petition or intervene. Those decisions contain no conclusions of law determining the defendant's liability. They are not "final determinations" within the meaning of 25 U.S.C. § 70s(b), and in consequence neither require nor contain "findings of fact."

The Opinion of June 13, 1973

In our opinion of June 13, 1973, 30 Ind. Cl. Comm. 419, we set forth our reasons for granting a motion of the La Jolla and Rincon plaintiffs, that the record be reopened and that a hearing be scheduled for the presentation of additional evidence on liability. It was essential in determining whether the motion should be granted, to ascertain insofar as possible, the admissibility of the proffered evidence. This was done by examining the affidavits of proposed witnesses, transcripts and quotations of testimony sought to be introduced, excerpts from documentary evidence, and the plaintiffs' allegations concerning the evidence, all of which was compared to evidence already in the record.

We determined that the evidence was admissible, and that the record should be reopened. The plaintiffs had sufficiently set forth the evidence and demonstrated that it was material and not merely cumulative, and that it might reasonably affect the end result of the case.[2/] In our opinion, we discussed the portent of the proffered evidence, to show its materiality. It is this discussion that the defendant objects to as improper "conclusions of fact and law." Specifically, the defendant objects to the following five statements in our opinion of June 13, 1973.

1. At 30 Ind. Cl. Comm. 424, in discussing the affidavit of Mr. Paul Henderson, concerning his irrigable acreage studies showing the water requirement of the La Jolla and Rincon reservations, we stated:

> Said requirement is substantially greater than the supply to those reservations under the contracts involved herein.

This statement was not a finding of fact but merely a summation of Mr. Henderson's affidavit, to indicate the materiality of his proffered testimony.

2. At the same page, we made the following similar statement concerning Florence Shipek's affidavit:

> An affidavit was also submitted by Florence Shipek concerning her latest studies of the farming practices and the history of the defendant's failure to protect the water supply of the Luiseno Indians, including the Rincon Band.

2/ See Combs v. Peters, 23 Wis. 2d 629, 127 N.W. 2d 750, 754 (1964); Re Eanelli's Estate, 260 Wis. 192, 68 N.W. 2d 791, 802, 802 (1955); Crouse v. McVickar, 207 N.Y. 213, 100 N.E. 697, 698 (1912).

The statement is not a Commission conclusion of fact or law, but merely a summation of the affidavit evidencing the substance of the testimony proffered by affiant.

3. We next discussed evidence the plaintiffs seek to introduce from related court actions by the Government against the Escondido Mutual Water Company, a licensee involved in this proceeding. The evidence includes the Government's complaint and testimony of Government witnesses, alleging that the practices of the licensee have been detrimental to the movants, have impaired their water rights, are in conflict with the purposes for which the reservations were created, and that the movants have been inadequately compensated. In summation, we stated at p. 425:

> The proffered evidence appears to be material in evidencing injury suffered by the plaintiffs and in refuting and impeaching the credibility of the defendant's prior assertions in this proceeding.

The statement is not a finding of fact or conclusion of law, but merely a comment on the apparent materiality of the evidence.

4. At 30 Ind. Cl. Comm. 425, we commented on the defendant's contention that the Commission is without jurisdiction to hear additional evidence because 25 U.S.C. § 70a provides that no claim accruing after August 13, 1946, shall be considered by the Commission. In respect to the plaintiffs' water rights, we stated at p. 426:

> It appears that theirs is a continuing cause of action which, while accruing prior to 1946, has continued thereafter.

At p. 428, we commented on the defendant's argument that the evidence sought to be introduced sheds no light on conditions prior to 1946. In pointing out the fallacies of that argument, we stated, inter alia:

> It overlooks the continuing nature of the plaintiff's cause of action.

These statements were not intended as a final conclusion of law, but merely as a preliminary appraisal relative to the admissibility of the evidence.

In its brief in support of its motion for rehearing, the defendant voices a lengthy argument that the plaintiffs have not suffered a continuing water right infringement. We will decide this matter when all the evidence is in.

5. At 30 Ind. Cl. Comm. 427, we explained that much of the evidence sought to be introduced was presented by the defendant in other cases, subsequent to December 31, 1970. We commented:

> To deny the admission of that evidence would be to unfairly deprive the plaintiffs of the defendant's belated efforts to fulfill its obligations to protect their rights, and to allow the defendant to benefit from its laches in that respect by leaving the defendant's prior evidence in this proceeding unimpeached.

This should not be construed as a finding of fact or conclusion of law, but merely as a further statement relating to the admissibility of the evidence.

The Opinion of June 21, 1973

Our opinion of June 21, 1973, deals with a motion of the San Pasqual plaintiff for leave to amend its petition, or alternatively to intervene.

The defendant objects to the following two statements in that opinion.

1. In pointing out that the desired amendment related back to the original petition, we stated at p. 455:

> . . . [T]he Government can be charged with notice of the possibility of San Pasqual's claims through its authority as administrator of Indian Affairs, through its enactment of the Mission Indian Relief Act, and through its whole course of action condoning and administering the diversion of San Luis Rey River waters in apparent derogation of the plaintiff's water rights. [Emphasis added.]

The defendant's objection to the underscored phrase, as a prejudicial conclusion of law, is unfounded. The phrase is not a conclusion of law, but rather an explanation relative to the admissibility of the amended petition. Whether or not the defendant's conduct was in derogation of the plaintiff's water rights will be decided in due course.

2. At 30 Ind. Cl. Comm. 451, we stated that under the circumstances of this case:

> . . . 25 U.S.C. § 70v-1(b) is inapplicable.

The statute provides that if a claimant fails to proceed with the trial of its claim on the date set forth for that purpose, the Commission shall dismiss the claim.

The defendant had contended that the provision barred the plaintiff's claim because the plaintiff had not appeared at the 1968 calendar conference scheduled pursuant to 25 U.S.C. § 70v-1(a). We pointed out that at the time of the 1968 conference, neither the Commission nor the San Pasqual Band was aware of the latter's claim. Furthermore, at the time of the conference, the San Pasqual Band was without legal counsel, had no knowledge of the statute, and had no notice of the conference. Thus, through no fault of the Commission or of the plaintiff, no date was set for trial of the San Pasqual claims.

Our determination that the plaintiff's claims may not be dismissed for failure to comply with a trial date which was never set, and that under the circumstances the statute was inapplicable, was legally correct and proper.

For these reasons the subject motion will be denied.

An appropriate order will issue.

Brantley Blue, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner